Jurisdictional Statement

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

RAYMOND CASILLAS, *Appellant*

v.

S.W.I.G. and ARGONAUT INSURANCE CO., *Appellees*

On Appeal from the Supreme Court of New Mexico

Jurisdictional Statement—State Civil

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QUESTION PRESENTED

Did the Supreme Court of New Mexico, in upholding the decision of the Court of Appeals of New Mexico err in finding that New Mexico's Workman's Compensation Act, Sections 52-1-9, 52-1-41 and 52-1-48 do not deprive Appellant of property without due process of law under the Fourteenth Amendment of the United States Constitution?

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IN THE

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RAYMOND CASILLAS, *Appellant*

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S.W.I.G. and ARGONAUT INSURANCE CO., *Appellees*

On Appeal from the Supreme Court of New Mexico

Jurisdictional Statement—State Civil

OPINIONS BELOW

The opinion of the Supreme Court of the State of New Mexico entered on May 21, 1981, denying certiorari, the opinion of the Court of Appeals of the State of New Mexico, entered on April 9, 1981 and the Order and Partial Summary Judgment of the District Court of Luna County, New Mexico entered on January 21, 1980 are set out in the Appendix hereto. The decision of the Court of Appeals and the Supreme Court are reported as Casillas v. S.W.I.G., at 628 P.2d 329 (1981) and 628 P.2d 686 (1981) respectively.

JURISDICTION

This action for worker's compensation disability benefits draws in question the validity of 1978 Revised Statutes of New Mexico, Sections 52-1-9, 52-1-41, and 52-1-48 on the ground that the monetary amount of compensa-

tion afforded totally and permanently disabled workers under New Mexico's mandatory and exclusive Workmen's Compensation Act is so inadequate as to be repugnant to the due process clause of the Fourteenth Amendment to the Constitution of the United States. New Mexico's Workmen's Compensation Act is mandatory; Section 52-1-9 provides that the compensation scheme afforded under New Mexico's Act shall be the exclusive remedy of all disabled New Mexico workers injured during the course of employment. Section 52-1-48 provides that any compensation received under the Act shall be limited to the benefits in effect on the date of injury. Section 52-1-41 states that the benefits to be paid to a permanently and totally disabled worker shall be sixty-six and two-thirds percent of his pre-injury average weekly wages, but not to exceed a maximum amount of one hundred percent of the state average weekly wage.

These provisions of New Mexico's Workmen's Compensation Act, which are mandatory in nature, which restrict totally and permanently disabled workers to total damages of only a fraction of their pre-injury wages (in no case to exceed the state average weekly wage), which amount is frozen as of the date of injury without any determination as to the adequacy of such compensation, deprive injured workers, such as Appellant, of property without due process of law and as such are unconstitutional under the Fourteenth Amendment to the Constitution of the United States.

This federal question was timely raised by Appellant as his Second Cause of Action to the First Amended Complaint filed in the District Court of Luna County, New Mexico and has been continuously raised on appeal. On January 21, 1980, the District Court of Luna County, New Mexico granted Appellees a Partial Summary Judg-

ment. In its Order, the Court held that the benefits payable under the Workmen's Compensation Act do not deprive Appellant of or violate any of his constitutional rights. On April 9, 1981, the Court of Appeals of the State of New Mexico upheld the District Court; the majority declared that the amount of disability benefits provided by the Act has a reasonable relation to the economic purpose involved and does not deprive injured workers of property with due process of law. The dissenting opinion of Justice Sutin states that the majority erred in applying a "reasonable relation" test, in that workmen's compensation for totally disabled workers ranks as a fundamental right, and as such, said compensation must be adequate to meet the test of "due process of law." On May 21, 1981 the Supreme Court of New Mexico denied Appellant's Petition for Write of Certiorari. Notice of Appeal to this Court was timely filed on June 18, 1981.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of New Mexico on appeal is conferred by 28 U.S.C. Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

In this appeal, the constitutionality of New Mexico statutes has been drawn in question and the State is not a party. Therefore, 28 U.S.C., Section 2403 (b) may be applicable and a copy of this Jurisdictional Statement has been served on the Attorney General of New Mexico.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1978 Revised Statutes of New Mexico, Section 52-1-9 provides:

> Right to compensation; exclusive.
>
> "The right to the compensation provided for in this act (52-1-1 to 52-1-69 NMSA 1978), in lieu of any other liability whatsoever, to any and all persons whomsoever, for any personal injury accidentally sustained or death resulting therefrom, shall obtain in all cases where the following conditions occur:
>
> A. at the time of the accident, the employer has complied with the provisions thereof regarding insurance;
>
> B. at the time of the accident, the employee is performing service arising out of and in the course of his employment; and
>
> C. the injury or death is proximately caused by accident arising out of and in the course of his employment and is not intentionally self-inflicted."

1978 Revised Statutes of New Mexico, Section 52-1-41 is set out in full in the Appendix hereto. In relevant part, the Statute provides:

> Compensation benefits; total disability.
>
> "A. For total disability the workman shall receive, during the period of that disability, sixty-six and two-thirds percent of his average weekly wages, . . . not to exceed a maximum compensation of one hundred percent of the average weekly wage in the state, a week, effective July 1, 1978; and to be not less than a minimum compensation of thirty-six dollars ($36.00) a week; but in no event to exceed a period of six hundred weeks. Where the workman's average weekly wages are less than thirty-six dollars ($36.00) a week, the compensation to be paid the workman shall be his full weekly wages. . . ."

1978 Revised Statutes of New Mexico, Section 52-1-48 provides:

> Additional limitation on benefits.
>
> "The benefits that a workman shall receive during the entire period of disability, and the benefits for death, shall be based on, and limited to, the benefits in effect on the date of the accidental injury resulting in the disability or death."

STATEMENT OF THE CASE

Raymond Casillas, Appellant, was seriously injured on May 15, 1979 when his arms were caught and crushed in a cotton compress while working for Appellee, S.W.I.G. Appellant filed a claim for workmen's compensation disability benefits in Luna County, New Mexico under New Mexico's Workmen's Compensation Act seeking benefits

for a total and permanent disability. Appellant in his Complaint requested that all benefits be paid in a lump sum as provided under New Mexico law. By way of a First Amended Complaint, Appellant alleged that the benefits provided under New Mexico's compensation scheme were inadequate and by relegating him and his family to a subsistence living, deprived him of his right to property without due process of law.

Under the New Mexico law in question, a permanently and totally disabled worker, such as Appellant, must seek recovery for his injuries under the worker's compensation scheme if his injury occurred during the course of and arose out of his employment. New Mexico's Act is mandatory and exclusive — the injured worker has no other remedy — his sole recovery for a totally disabling injury is the compensation and medical benefits provided under the Workmen's Compensation Act. Under the section providing for benefits for a permanent and total injury, Appellant is entitled to receive an amount equal to two-thirds of his average weekly wage prior to the injury for a maximum period of six hundred weeks. Furthermore, this amount of compensation is forever frozen, without adjustment, to the benefits in effect on the date of injury, regardless of any increase in benefits which may be promulgated by the New Mexico Legislature. In sum total, Appellant, who suffered a total and permanent injury in May, 1979, will recover for his lifelong total loss of earning power the amount of $81.32 a week for 600 weeks.

In the District Court, Appellees moved for summary judgment on the basis that because the employer was voluntarily paying Appellant the maximum weekly benefits as provided under New Mexico law, Appellant's lawsuit was premature and should be dismissed. On

January 21, 1980, the District Court entered an Order and Partial Summary Judgment dismissing Appellant's claim without prejudice, to be refiled if and when S.W.I.G. discontinued making voluntary compensation benefits. In its order, the Court also held that the benefits payable under the Workmen's Compensation Act do not deprive Appellant of or violate any of his constitutional rights and dismissed Appellant's constitutional claims with prejudice.

On April 9, 1981, the Court of Appeals of New Mexico, in a 2-1 decision, upheld the ruling of the District Court. The Court of Appeals in its opinion held that Appellant has not been denied a due process property right, since the only property he is entitled to is the amount which the New Mexico Legislature sees fit to confer.

On May 21, 1981 Appellant's Petition for Writ of Certiorari was denied by the Supreme Court of New Mexico. Appellant timely filed a Notice of Appeal to this Court on June 18, 1981.

THE FEDERAL QUESTION IS SUBSTANTIAL

Appellant, Raymond Casillas, an employee of Appellee S.W.I.G., was seriously injured on the job in May, 1979 when his arms were caught and crushed in a cotton compress. As a result of this injury, Appellant became totally disabled and is unable to continue working. New Mexico's worker's compensation law is mandatory — if the injury occurs during the course of employment, the injured worker is restricted to recovering only those damages allowed under the worker's compensation statutes. Section 52-1-41 provides the formula to determine the recovery Appellant can receive for a total and permanent disability — two-thirds of his pre-injury average weekly wage for a maximum period of 600 weeks. These

are the benefits Appellees have been voluntarily paying since the date of injury. In the case at bar, the damages Appellant is receiving to compensate him for a permanent and total loss of earning power and livelihood for he and his family is $81.32 a week for 600 weeks. It has been Appellant's position from the beginning of this litigation, that the mandatory and exclusive nature of New Mexico's Workmen's Compensation Act in combination with the grossly inadequate compensation benefits for totally disabled workers relegate he and his family to a subsistence level of living and thereby deprive him of property with due process of law.

This entire constitutional issue was decided by the trial court on a Motion for Summary Judgment. The only evidence before the District Court on this constitutional question at the time of its ruling was Appellant's Affidavit to the effect that at the time of his injury he was earning minimum wage on which he supported a family of eight and that since the accident he and his family, being unable to survive on the compensation of $81.32 a week, had to seek public assistance in the form of welfare and food stamps. The Appellant lives in the small town of Deming, New Mexico, a town of less than 10,000 people, located approximately 20 miles north of the Mexican border in southern New Mexico. Although he has formerly attended school, his education was in special education classes and he has never learned how to read, nor can he write except to sign his name. His primary language is Spanish, although he is bilingual with English being his second language. He lives with and supports his wife, five natural children and one step-child, with the children ranging in age from two to twelve years old. The only facts before the court reflect that Appellant Raymond Casillas has no health or life insurance, no sav-

ings or checking accounts, owns no property other than a 1958 station wagon, his family's clothes, personal effects and small items of furniture. Since the tragic accident which took the Appellant's livelihood from him, the "compensation," as reflected in the record, has deprived he and his family of even the most simple pleasures, such as being able to take his family to a movie. The record reflects not only the physical deprivation that comes with grinding poverty, but also the emotional and psychological trauma resulting from the increased tension arising from the tragic accident and the equally tragic and unconstitutional "compensation" received by the Appellant.

Workmen's compensation acts have been passed and are law in all fifty of the United States. The issues raised in this appeal will substantially effect every workmen's compensation act in this country. The woeful inadequacy of many of these acts have long been recognized by Congress. As this court may be aware, a national workmen's compensation act has been considered in the Congress of the United States for many years. In his opening statement Tuesday, September 19, 1978, the chairman of the Subcommittee of Labor of the Committee of Human Resources stated:

> This afternoon we open our hearings on S. 3060, the National Worker's Compensation Standards Act of 1978.
>
> The bill which we are considering today has evolved from two earlier bills which Senator Javits and I introduced in previous Congresses. This proposal is, just as these earlier bills were, based on the recommendations of the National Commission of State Workmen's Compensation Laws.

That blue ribbon commission, composed of the Nation's best experts on workers' compensation, filed its report in June of 1972. Their report concluded that State programs did not adequately compensate the victims of industrial injuries and diseases. The commission made a series of recommendations for improving State laws, and recommended that if the States did not sufficiently improve their laws by June of 1975, Federal legislation accomplishing basic reforms would be in order.

In 1977, a task force established by the previous administration also studied State workers' compensation laws, and concluded that the need for Federal minimum standards still exists. The policy group of that task force found that our present system for compensating work-related permanent total disability and death results in "excessive litigation, long delays in payment, high subsequent rates of persons without employment, and little relationship between benefits awarded and the actual wage loss."

These studies starkly portray the large and continuing gap between what must be done to compensate employees and what is being done today. Therefore, in my opinion, the time has come for legislation providing minimum Federal standards which will *redress the injustice of inadequate workers' compensation.*

(emphasis added)

Again, in 1979, Senators Williams and Javits introduced Senate Bill 420, entitled *National Workers' Compensation Standards Act of 1979.* As was reported in the Congressional record on February 9, 1979, beginning at page S1451, Senator Williams states:

> Compensating those workers who are injured, killed, or diseased on the job traditionally has been the subject of the laws of the States. These laws were enacted in each of our States between 1910 and 1948, and reflected a compassionate concern for those working men and women who are disabled as a result of their employment.
>
> While these laws were born in the spirit of compassion, they have regretably fallen woefully behind the times. In many cases, they now constitute a cruel hoax on America's workers.
>
> * * *
>
> In several other states, a permanently and totally disabled worker can only receive benefits for a fixed period of time—in some instances, less than 7 years. This means that a worker who is permanently and totally disabled, at age 20, may receive no workers' compensation benefits beyond his 27th birthday.

This cruel hoax is the subject of this appeal. All of these proposed national bills require that there be no limitation in the amount of time a worker be paid for total disability. The Appellant herein is limited to 600 weeks. In addition, they set a minimum floor on minimum payments for workers which exceed the sum in every case now paid to the Appellant Raymond Casillas.

Appellant has never challenged the constitutionality of compulsory workmen compensation schemes—this issue was laid to rest a half century ago. *See, e.g., Atchison, Topeka & Santa Fe Ry Co.*, 298 U.S. 141 (1935); *Madera Sugar Pine Co. v. Industrial Acc. Comin*, 262 U.S. 499, 501-502 (1922); *New York Central R.R. Co. v. White*, 243 U.S. 188 (1916). He instead challenges the present day adequacy of the compensation scheme set forth under New Mexico law for totally disabled workers as a viola-

tion of due process under the Fourteenth Amendment to the United States Constitution.

The Court of Appeals of New Mexico in a 2-1 decision, upheld the dismissal of Appellant's constitutional claim. The Court recognized that the Appellant's claim involved substantive due process, but went on to hold that such benefits are not a fundamental right under New Mexico law, nor can they constitute a deprivation of property because Appellant's only property right is restricted to whatever benefits the Legislature sees fit to confer—no more, no less. The dissenting opinion disagreed that no fundamental right or vested property interest is involved in Appellant's claim. "A workman who receives so little an amount in compensation payments that it cripples the 'life, liberty or property' of the workman and his family, has the right to test 'due process of law.' . . . The benefits payable to one totally disabled under the Workmen's Compensation Act does not reach the subsistence level. It deprives plaintiff of, or violates, his constitutional rights under the 'due process clause.' A genuine issue of material fact exists on whether plaintiff receives adequate compensation. This portion of the Partial Summary Judgment should be reversed."

Workers' compensation acts were enacted at the turn of the century to create a legal quid pro quo for employers and employees. They were the offspring of a desire to give injured workers a quicker and more certain recovery than can be obtained from tort suits based on negligence and as such are substitutes for common law tort actions. See *United States v. Demko*, 385 U.S. 149, 151 (1966). Under a compulsory system as in New Mexico, an injured employee has no choice but to accept whatever benefits are available under state law, as the workers compensation statute is his exclusive remedy.

See, e.g., Mountain States Tel. & Tel. Co. v. Montoya, 91 N.M. 788, 581 P.2d 1283 (1978); *Sanford v. Presto Manuf. Co.*, 92 N.M. 746, 594 P.2d 1202 (Ct. App. 1979). This bar against civil redress in court for damages sustained by injured employees applies in New Mexico not only to the injured worker but all members of his family as well. *See Roseberry v. Phillips Petrol. Co.*, 70 N.M. 19, 369 P.2d 403, 404-405 (1961). Because compulsory worker's compensation statutes are substitutes for the damages an injured worker could otherwise recover in a court of law under common law tort, to pass constitutional muster under the fourteenth amendment the system of compensation afforded must provide a means to adequately compensate the injured worker for his loss of earning power.

Appellant's injury on the job, through no fault of his own, resulted in a total disability and deprived him of his ability to earn a living. His right to be compensated for the total loss of his earning capacity is a fundamental right: An employee's ability to earn a living in his capital in trade. *See New York Central R.R. Co. v. White*, 243 U.S. 188, 203 (1916). Appellant's right to recover compensatory damages for his loss of earning power is also a property right protected by the fourteenth amendment. As such, workmen's compensation statutes, as a quid pro quo or substitute system for common law tort remedies must adequately replace the fundamental rights and property interests that are taken away.

The majority of the Court of Appeals, in affirming dismissal of Appellant's constitutional claims, did so on the basis that the extent of any property right involved in a worker's compensation case is restricted to whatever amount the Legislature sees fit to confer — that Appellant's problem is for the Legislature to correct, not the courts. Although this constitutional claim may be a case

of first impression in New Mexico, or for that matter in the entire nation, it was, nonetheless anticipated over a half century ago by this Court when it was first asked to review the constitutionality of workmen's compensation schemes in general. In 1916, this Court while affirming the legality of workmen's compensation acts in general, warned:

> This of course, is not to say that any scale of compensation, however insignificant, on the one hand, or onerous, on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

New York Central R.R. Co. v. White, 243 U.S. 138, 206 (1916).

The guarantee of due process, as it has been often been held, demands that the means selected to achieve a legitimate state purpose must have a substantial relation to the object sought to be obtained. *See Nebbia v. New York*, 291 U.S. 502, 524 (1933). The primary purpose of New Mexico's worker's compensation act is to keep an injured worker and his family at least minimally secure financially. *See Aranda v. Mississippi Chemical Co.*, 93 N.M. 412, 600 P.2d 1202, 1206 (Ct. App. 1979). As stated by the dissent in the Court of Appeals decision, "in New Mexico, a workman who is totally disabled and cannot earn a living for himself and his family is entitled to live above a subsistence level, not as it existed yesterday, but as it exists today and tomorrow. Compensation payments must reach that level."

New Mexico's compensation scheme does not pass constitutional muster, but rather has forced Appellant and his family to seek public assistance to survive — a fact which has never been controverted in this litigation. Yet, the avowed public purpose for even having a workmen's compensation scheme is supposedly to prevent such a result. "To prevent the claimant from being on the welfare rolls is part of the legislative scheme." *See Codling v. Aztec Well Servicing Co.*, 89 N.M. 213, 549 P.2d 628, 630 (Ct. App. 1976). Because New Mexico's compensation scheme has relegated Appellant and his family to a subsistence level of living, the very same evil the act was purportedly intended to avoid, the legislation cannot be supported as a legitimate exercise of the state's police powers. It is little consolation to injured workers in New Mexico that they have traded away a "nebulous and uncertain cause of action [common law tort] . . . for a definite and immediate recovery without regard to fault" where said recovery imprisons them forevermore in a life of poverty. *See Kasnoski v. Consolidation Coal Co.*, 368 F. Supp. 1022, 1024 (W.D. Pa. 1971).

In summary, the majority opinion of the New Mexico Court of Appeals which became final when the Supreme Court denied certiorari is not justifiable on any reasoned basis. To characterize Appellant's constitutional due process rights to be equivalent to whatever benefits the Legislature feels fit to bestow merely begs the question as well as being a misguided statement of due process of law. As set forth hereinabove, even the Congress of the United States recognizes the failure of the states' workmen's compensation acts, of which New Mexico's is one of the most backward. If one followed the reasoning of the majority opinion in the Court of Appeals for the state of New Mexico, legislatures of this state would be free to

compensate totally permanently disabled workmen the sum of $10.00 a week for 50 weeks, if it so desired. If this were indeed the law, there would be no purpose for the fourteenth amendment. Such a decision merits a summary reversal by this Court.

CONCLUSION

The decision below upholding the constitutionality of New Mexico's worker's compensation scheme for totally disabled employees such as Appellant under the fourteenth amendment's due process clause should be reversed and sent back to the New Mexico Supreme Court for a decision whether the remedy should be to invalidate the provisions of New Mexico's worker's compensation statutes providing benefits for totally disabled employees or, alternatively, to grant Appellant the right to proceed in court to establish the extent of his injury and to recover his damages in a civil tort action at law.

Respectfully submitted,

MARTIN, LUTZ, CRESSWELL & HUBERT, P.A.

By _____

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APPENDIX

1978 New Mexico Revised Statute, Section 52-1-41. Compensation benefits; total disability.

A. For total disability the workman shall receive, during the period of that disability, sixty-six and two-thirds percent of his average weekly wages, not to exceed a maximum compensation of ninety dollars ($90.00) a week, effective July 1, 1975; and not to exceed a maximum compensation of sixty-six and two-thirds percent of the average weekly wage in the state, a week, effective January 1, 1976; and not to exceed a maximum compensation of seventy-eight percent of the average weekly wage in the state, a week, effective July 1, 1976; and not to exceed a maximum compensation of eighty-nine percent of the average weekly wage in the state, a week, effective July 1, 1977; and not to exceed a maximum compensation of one hundred percent of the average weekly wage in the state, a week, effective July 1, 1978; and to be not less than a minimum compensation of thirty-six dollars ($36.00) a week; but in no event to exceed a period of six hundred weeks. Where the workman's average weekly wages are less than thirty-six dollars ($36.00) a week, the compensation to be paid the workman shall be his full weekly wages.

B. For the purpose of the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978] the average weekly wage in the state shall be determined by the employment security commission (employment services division) on or before June 30 of each year, and shall be computed from all wages reported to the employment security commission (division) from employing units, including reimbursable employers, in accordance with the regulations of the commission (division) for the preceding cal-

endar year, divided by the total number of covered employees divided by fifty-two. The first such determination by the employment security commission (division) of the average weekly wage in the state shall be made on or before June 30, 1975, from reported wages and covered employees for the calendar year ending December 31, 1974.

C. The average weekly wage in the state, determined as provided in Subsection B of this section, shall be applicable for the full period during which compensation is payable, when the date of the occurrence of an accidental injury falls within the calendar commencing January 1 following the June 30 determination.

D. Unless the computation provided for in Subsection B of this section results in an increase or decrease of two dollars ($2.00) or more, raised to the next dollar, the state wide average weekly wage determination shall not be changed for any calendar year.

IN THE SUPREME COURT OF THE STATE
OF NEW MEXICO
Thursday, May 21, 1981

No. 13,638

RAYMOND CASILLAS, Petitioner,

vs.

S.W.I.G. and ARGONAUT INSURANCE COMPANY,
Respondents.

Original Proceeding on Certiorari

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition and being sufficiently advised in the premises;

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the Record in Cause No. 4825 be and the same is hereby returned to the Clerk of the Court of Appeals.

Attest: A True Copy

/s/ Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

[Court of Appeals of New Mexico Filed April 9, 1981, Susan H. Baquell]

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 4825

RAYMOND CASILLAS, Plaintiff-Appellant,

v.

S.W.I.G. and ARGONAUT INSURANCE COMPANY, Defendants-Appellees.

Appeal From the District Court of Luna County
HUGHES, Judge

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OPINION

WOOD, Judge.

Plaintiff suffered a compensable injury and is being paid compensation benefits. His suit made two claims:

(1) that our compensation statute violated due process to the extent the disability benefits were inadequate in amount; and (2) that he was entitled to a ten percent increase in disability benefits under our safety device statute, § 52-1-10, N.M.S.A. 1978. The trial court ruled against each claim; plaintiff appeals.

Due Process — Amount of Disability Benefits

Plaintiff recognizes that he comes within § 52-1-9, N.M.S.A. 1978, which provides that his right to compensation is his exclusive remedy against his employer. He recognizes that he is being paid the maximum benefits authorized for a total disability under § 52-1-41, N.M.S.A. 1978, and that the dollar amount of those benefits is limited to the amount payable at the time disability began, see § 52-1-48, N.M.S.A. 1978.

Plaintiff does not claim that a compulsory worker's compensation system is unconstitutional. Tipton v. Atchison, T. & S. F. R. Co., 298 U.S. 141, 80 L.Ed. 1091, 56 S.Ct. 715 (1936); New York Central R. R. Co. v. White, 243 U.S. 188, 61 L.Ed. 667, 37 S.CT. 247 (1917); compare Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (Ct.App. 1977).

Plaintiff's claim is that New Mexico's compensation statute deprives him of due process because it does not provide sufficient compensation and "relegates disabled workers to a subsistence standard of living." Plaintiff argues that a compensation system which, he claims, is a substitute for the worker's right to recover common-law damages, deprives the worker of due process unless the disability benefits adequately compensate the injured worker. In support of this argument plaintiff points out that the disability benefits being paid to him ($81.32 per week) are two-thirds of his average weekly

wage, and that under minimum wage laws in effect at the time of his injury, his minimum wage, at $2.90 per hour for a 40-hour week, would have been $116.00 per week. The inference is that disability benefits which are less than a statutory minimum wage scale establish inadequate compensation and are a violation of due process. The argument is specious because it is based on the view that benefits paid to a disabled worker may not be less than the minimum wage paid to someone working 40 hours a week.

Plaintiff states that he has found no decision which supports his claim; he does, however, refer us to New York Central R. R. Co. v. White, supra, which in upholding compulsory compensation, stated:

> This, of course, is not to say that any scale of compensation, however insignificant on the one hand or onerous on the other, would be supportable. In this case, no criticism is made on the ground that the compensation prescribed by the statute in question is unreasonable in amount, either in general or in the particular case. Any question of that kind may be met when it arises.

Plaintiff challenges the amount of disability benefits being paid to him, claiming that with the number of children he supports, the amount is unreasonable.

Plaintiff's claim involves substantive due process. We do not attempt to outline the present boundaries of the concept. See Lochner v. New York, 198 U.S. 45, 49 L.Ed. 937, 25 S.Ct. 539 (1905); West Coast Hotel Company v. Parrish, 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578 (1937); Lincoln Fed. L. U. v. Northwestern I. & M. Co., 335 U.S. 525, 93 L.Ed.2d 212, 69 S.Ct. 251 (1949); L. Tribe, *American Constitutional Law* Ch. 8 (1978);

Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases*, 71 Nw. U. L. Rev. 417 (1976-77); Perry, *Abortion, the Public Morals, and the Police Power: The Ethical Function of Substantive Due Process*, 23 U.C.L.A. L. Rev. 689 (1976); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L. J. 221 (1973-74). Rather, we assume, but do not decide that plaintiff's claim is one on which relief could be afforded, and decide the merits of the claim.

Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980), comments: "A state violates the due process clause when it interferes with a fundamental right or a vested property interest." *Pedrazza* holds that workmen's compensation is not a fundamental right. Assuming that plaintiff has a vested property interest in disability benefits provided by our statute, plaintiff is being paid those benefits. Plaintiff is asserting a due process right to benefits which have not been authorized by the Legislature, specifically, the right to a larger amount for disability. *Pedrazza* states: "This Court will not . . . say that the plaintiffs have a due process property right which the Legislature has not seen fit to confer . . . ." Under *Pedrazza*, plaintiff's due process claim to larger disability benefits is without merit.

Rocky Mountain Whole. Co. v. Ponca Whole. Mercan. Co., 68 N.M. 228, 360 P.2d 643 (1961), remarks:

> [A] state is free to adopt an economic policy that may reasonably be deemed to promote the public welfare and may enforce that policy by appropriate legislation without violation of the due process clause so long as such legislation has a reasonable relation to a proper legislative purpose and is neither arbitrary nor discriminatory.

The purpose of our workmen's compensation statute is to provide an humanitarian and economical system of compensation to the injured workman. Graham v. Wheeler, 77 N.M. 455, 423 P.2d 980 (1967). That our statute has a proper legislative purpose is not questioned. See Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924). The statute is neither arbitrary nor discriminatory; its provisions apply to all workers subject to the statute. See State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595 (1953). The issue is whether the amount of the disability benefits provided by the act has a reasonable relation to the economic purpose involved.

The economic purpose is to keep an injured workman and his family at least minimally secure financially, Aranda v. Mississippi Chemical Corp., 93 N.M. 412, 600 P.2d 1202 (Ct.App. 1979); "to secure the injured employee against want, and to avoid his becoming a public charge," Hughey v. Ware, et al., 34 N.M. 29, 276 P. 27 (1929). "A large discretion is necessarily vested in the Legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests." State v. Spears, at 410.

We cannot hold that disability benefits based on two-thirds of plaintiff's average weekly wage have no reasonable relation to the economic purpose of the compensation statute. Plaintiff argues this issue solely on the basis of the dollar amount of the disability benefits; this argument fails to consider other benefits of economic nature conferred by the statute. Some of these benefits are: A uniform scale of compensation which substitutes for the "varying and widely divergent estimates of juries," Gonzales v. Chino Copper Co., supra; a right to compensation which eliminates legal defenses favorable to the employer, § 52-1-8, N.M.S.A. 1978; Gonzales v. Chino

Copper Co.; medical and related benefits, § 52-1-49, N.M.S.A. 1978, which at the time of the district court hearing amounted to $7,828.64; and rehabilitation services, § 52-1-50, N.M.S.A. 1978. Viewing all of these economic benefits, the amount paid for disability does have a reasonable relation to the economic purpose of our statute; the amount of the disability benefit did not violate due process, either on the face of the statute or as applied to plaintiff.

Safety Device

Plaintiff sought a ten percent increase in his disability benefits on the basis that the employer had failed "to provide safety devices required by law . . . ." Section 52-1-10(B), supra. His theory was that certain safety devices were required by regulations adopted under New Mexico's Occupational Health and Safety Act, § § 50-9-2 and 50-9-7, N.M.S.A. 1978, and that safety devices required by these regulations had not been provided by the employer. The trial court ruled that these regulations were not admissible. There being nothing else showing a failure to provide safety devices required "by law," the safety device issue was dismissed with prejudice.

The trial court ruled correctly that the safety devices required by the regulations were not required "by law" because of § 50-9-21(A), N.M.S.A. 1978. This statute reads:

> A. Nothing in the Occupational Health and Safety Act [50-9-1 to 50-9-25 NMSA 1978] shall be construed or held to supersede or in any manner affect the Workmen's Compensation Act [52-1-1 to 52-1-69 NMSA 1978], the New Mexico Occupational Disease Disablement Law [52-3-1 to 52-3-54 NMSA 1978], or to enlarge or diminish or affect in any other manner

> the common-law or statutory rights, duties or liabilities of employers and employees under the laws of this state with respect to injuries, occupational or other diseases or death of employees arising out of or in the course of employment.

Section 50-9-21(A) provides that *nothing* in New Mexico's Occupational Health and Safety Act affects our Compensation Act, or the liabilities of employers under the laws of this state with respect to injuries arising out of or in the course of employment. Inasmuch as New Mexico's Occupational Health and Safety Act does not affect the employer's liability under our Compensation Act, regulations adopted under the authority of New Mexico's Occupational Health and Safety Act also do not affect that liability, and safety devices required by the Occupational Health and Safety Act regulations are not required "by law" for the purposes of § 52-1-10(B), supra. Compare Arvas v. Feather's Jewelers, 92 N.M. 89, 582 P.2d 1302 (Ct.App. 1978). We disagree with Childers v. International Harvester Co., 569 S.W.2d 675 (Ky.App. 1977), which reached a contrary conclusion without considering the express language contained in the Kentucky statute which is similar to § 50-9-21(A), supra.

The trial court's order rejecting the due process claim, and its order dismissing the safety device claim, are affirmed.

IT IS SO ORDERED.

/s/ Joe Wood
Judge

I Concur:
/s/ Ramon Lopez

Lewis Sutin, J. (Dissenting)

SUTIN, Judge (Dissenting)

I dissent.

Plaintiff, 28 years of age, suffered an accidental injury on May 15, 1979, in which accident his arms were crushed. As a result, he suffered total disability. Defendants pay plaintiff $81.30 per week, about $4,212.00 annually for maximum compensation payments. The rate of compensation payable is 100% of the average weekly wage in the State as determined by the Employment Security Commission. Section 52-1-41, N.M.S.A. 1978.

Plaintiff claims that § 52-1-41 is unconstitutional in that it deprives plaintiff of his right to property, and his right to due process of law, inasmuch as the amount of money paid is below any reasonable subsistence level. I agree.

The trial court granted defendants a partial summary judgment. Due to the fact that defendants pay plaintiff maximum compensation benefits the court reasoned "That the benefits payable under the Workmen's Compensation Act do not deprive plaintiff of or violate any of his constitutional rights." Plaintiff appeals from this portion of the Order and Partial Summary Judgment.

Plaintiff is married. His family consists of a wife, a stepson and five children, whose ages were 10, 7, 6, 5, 2 and 1 years. The family receives $250.00 per month for food stamps and an additional $114.00 per month for his stepson. He owns a 1968 station wagon.

Plaintiff rents a house which consists of two bedrooms, a kitchen, a living area and a bathroom. His rent and utilities are $160.00 per month. He has no health or life insurance, no savings or checking accounts, nor any property other than his car and household effects. He is heavily indebted. He cannot read or write. His education was had in special education classes that terminated at junior high school level.

Since the accident, there is absolutely no money whatever for anything but the bare necessities of life made possible by government food stamps. Plaintiff cannot provide his family with better health care, clothing, or educational opportunities. He would like to provide life insurance on himself for the benefit of the family. Tension has increased in the family due to lack of resources. To keep his family together, he feels that he should be paid in compensation at least as much as he was paid for his work. These facts have not been controverted.

The purpose of the Workmen's Compensation Act has been stated in many ways: (1) to substitute a more humanitarian and economical system of compensation, Gonzales v. Chino Copper Co., 29 N.M. 228, 222 P. 903 (1924); (2) to provide enough compensation to avoid reducing a claimant to destitution, Baca v. Gutierrez, 77 N.M. 428, 423 P.2d 617 (1967); (3) to prevent claimant from becoming a public charge, Lane v. Levi Strauss & Co., 92 N.M. 504, 590 P.2d 652 (Ct.App. 1979); (4) to prevent claimant from being on welfare rolls, Codling v. Aztec Well Servicing Co., 89 N.M. 213, 549 P.2d 628 (Ct.App. 1976); (5) to keep an injured workman and his family at least minimally secure financially, Aranda v. Mississippi Chemical Corp., 93 N.M. 412, 600 P.2d 1202 (Ct.App. 1979); (6) to insure that the claimant may subsist during his period of disability, Mullins v. National

Food Stores of Louisiana, Inc., 175 So.2d 19 (La.App. 1965); (7) to relieve against hardships, Kellams v. Carolina Metal Products, 248 N.C. 199, 102 S.E.2d 841 (1958); Baker v. Industrial Commission, 17 Utah 2d. 141, 405 P.2d 613 (1965); (8) to furnish financial protection, Colclasure v. Industrial Commission, 14 Ill.2d 455, 153 N.E.2d 33 (1958); (9) to give adequate economic assistance, Davis v. Cranston Print Works Company, 133 A.2d 784 (R.I. 1957); (10) to provide adequate compensatory payments, Crilly v. Ballou, 353 Mich. 303, 91 N.W.2d 493 (1958); (11) to relieve society of burden of supporting helpless children in orphanages and public alms houses, Franklin v. Jackson, 95 So.2d 794 (Miss. 1958); (12) to protect employees and their dependents unable to support themselves, Kelly v. Sugerman, 12 N.Y.2d 298, 189 N.E.2d 613 (1963); (13) to shoulder on industry the expense incident to the hazards of industry; to lift from the public the burden to support those incapacited by industry and to ultimately pass on such expense to the consumers of the products of industry, Renshaw v. U.S. Pipe & Foundry Co., 30 N.J. 458, 153 A.2d 673 (1959).

The totality of these purposes evince the philosophy of the Workmen's Compensation Act. It ventures to do economic justice to a totally disabled workman.

Article II, Section 18 of our Constitution says:

> *No person* shall be deprived of life, liberty or property without due process of law . . . . [Emphasis added.]

The term "due process of law" cannot be defined. It is so broad in meaning that limitations cannot be placed upon it. This concept requires only that the legislature shall not offend the traditional notions of "fair play," "substantial justice" or the "general welfare." In re

D. M. D., 54 Wis.2d 313, 195 N.W.2d 594 (1972) says that "due process" is the exact synonym for "fundamental fairness." A guaranty of "due process of law" constitutes a legal right assertable in courts. When we adopted our Constitution in 1910, "We could have no purpose except to check the Legislature, as representing the majority *for the time being*, from encroachment upon this reserved right of the minority or of the individual." [Emphasis added.] State v. Henry, 37 N.M. 536, 543, 25 P.2d 204 (1933).

Pedrazza v. Sid Fleming Con., Inc., 94 N.M. 59, 607 P.2d 597 (1980) held that property rights in workmen's compensation claims, protected by due process, never vests in nonresident alien dependents; that nonresident alien dependents do not have a "fundamental right" to pursue compensation benefits in New Mexico courts, nor do they have a "vested property interest" in compensation claims if a family workman is fatally injured in New Mexico.

The words, "no person" in the Constitution, *supra*, includes a nonresident alien dependent, one who is protected by the "due process clause." Section 52-1-52, N.M.S.A. 1978 specifically denies dependents, who are nonresidents of the United States at the time of a workman's injury, the right to pursue a claim for compensation. This section interferes with the "fundamental right" of nonresident alien dependents to use our courts to recover workmen's compensation benefits. It does constitute a denial of due process.

Pedrazza says:

> . . . A state violates the due process clause when it interferes with a fundamental right or a vested property interest. [Citation omitted] No law has

> been cited, nor can we find any, stating that workmen's compensation is or ought to be ranked as a fundamental right within the framework of the Constitution.
>
> * * *
>
> The worker's . . . right to compensation benefits arise and may be received only as specified by statute. . . . [Id. 599.]

Under *Pedrazza, resident* alien dependents would be protected by the "due process clause." In fact, any dependent resident of a workman has a "fundamental right" to pursue a workman's compensation claim as well as a "vested property interest" in compensation claims. A resident dependent may look to the Workmen's Compensation Act to determine whether any portion of it interferes with such right and vested interest. If § 52-1-41 does interfere with a workman's "vested property interest" in his compensation claim, he has the protection of the "due process clause." He has a "fundamental right" to challenge the constitutionality of that portion of the Act.

In this sense, workmen's compensation does rank as a "fundamental right" if the Act denies a totally disabled workman adequate compensation to meet the reasonably normal needs of a family in the environment in which the family exists. Such compensation must reasonably approach the earnings of a workman prior to the tragic experience that resulted in total disability. Otherwise, the purpose and spirit of the Act fades. The primary purpose of the Act is to lift a totally disabled workman and his family out of the depths of economic despair into a realm above the subsistence level. We must avoid eclectic language of judicial opinions to skirt around the seamy side of a poor, uneducated workman and his family. If the Act offends traditional notions of "fundamental

fairness," "fair play," "substantial justice" or the "general welfare," it violates the "due process clause."

The "right to make a living" is not a "fundamental right" for purposes of due process. Frazier v. Liberty Mut. Ins. Co., 150 N.J.Super. 123, 374 A.2d 1259 (1977). But inability to earn a living by reason of total disability grants a workman a "fundamental right." A workman who receives so little an amount in compensation payments that it cripples the "life, liberty or property" of the workman and his family, has the right to test "due process of law." To determine whether the effect of the compensation payment offends traditional notions, we look through a wide-angled lense and not one with a restricted focus.

From the time the Workmen's Compensation Act was adopted in 1917, totally disabled workmen received a pittance in compensation payments. In 1917, a workman totally disabled received an amount not to exceed maximum compensation of $10.00 per week, L. 1917, ch. 83, § 17(a). This was raised to $15.00 per week, 1929 Compilation, ch. 156, § 156-117(a), then from $15.00 to $18.00 per week in 1937, L. 1937, ch. 92, § 9. Over the next four decades, compensation for total disability was gradually but slowly increased.

Effective July 1, 1978, a workman was to receive an amount not to exceed a maximum compensation of one hundred percent of the average weekly wage. Section 52-1-41. If this portion of the statute interferes with a "vested property interest" of plaintiff, the State violates the due process clause.

The gradual increase in compensation payments were legislative attempts to meet the economic purposes of the Workmen's Compensation Act as stated above. To do

so, the Legislature must note economic conditions that today exist for some 600 weeks, the period that encompasses total permanent disability. It must also note the effect that compensation payments have upon the subsistence level of family life. A totally disabled workman has a fundamental right to question the Legislature about his "vested property interest," i.e., his compensation payments. These payments must be sufficient to provide the workman and his family with food, clothing, physical and medical care and the incidents that make life pleasant. Scientific, industrial and agricultural developments in this century, unavailable in 1917, should not be denied a family that now suffers the severe burdens imposed upon it by a totally disabled master of the household. We must make it clear that, in New Mexico, a workman who is totally disabled and cannot earn a living for himself and his family, is entitled to have his family live above the subsistence level, not as it existed yesterday, but as it exists today and tomorrow. Compensation payments must reach that level.

The Legislature recognized this problem with reference to the cost of medical care. Prior to 1977, the cost of medical services was limited to $40,000.00. The 1977 amendment deleted "not to exceed the sum of forty thousand ($40,000)" as shown in § 52-1-49. No violation of due process can arise.

The "due process clause" has been a vague, uncertain, indefinite and indistinct concept since the founding of this country. It has been applied as courts view each case from the standpoint of "fundamental fairness." We approach its application to the Workmen's Compensation Act for the first known time. For over half a century, we have looked through a wide-angled lens to favor the workman. We should do so now.

The benefits payable to one totally disabled under the Workmen's Compensation Act does not reach the subsistence level. It deprives plaintiff of, or violates, his constitutional rights under the "due process clause." A genuine issue of material fact exists on whether plaintiff receives adequate compensation.

This portion of the partial summary judgment should be reversed.

Plaintiff also sought to have his compensation payments increased by 10% under § 52-1-10(B) which reads:

> In case an injury to . . . a workman results from the failure of an employer to provide safety devices *required by law, or* in any industry in which safety devices are *not prescribed* by statute, if an injury to . . . a workman results from the negligence of the employer in failing to supply reasonable safety devices *in general use for the use or protection of the workman*, then the compensation otherwise payable under the Workmen's Compensation Act shall be increased ten percent. [Emphasis added.]

There are two bases upon which a 10% increase in compensation can be obtained: (1) the failure of an employer to provide safety devices as "required by law" and (2) the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman.

Plaintiff produced a qualified engineer to prove the lack of safety devices. When his expert testimony reached the point at which such lack of safety devices was to be shown, plaintiff, for some unaccountable reason, requested the court to refer to the Occupational Health and Safety Act (OSHA), § 50-9-1, et seq., N.M.S.A. 1978. After much objection and argument, the

court ruled that OSHA did not apply. For some unaccountable reason, no further questioning of the expert witness took place. Plaintiff then closed his case.

No evidence was offered or presented on the subject of safety devices as required by § 50-9-21(A).

Section 50-9-21(A) reads:

> Nothing in . . . [OSHA] shall be construed or held to supersede or in any manner affect the Workmen's Compensation Act . . . .

This section means (1) that we can take nothing out of OSHA that will take the place of the Workmen's Compensation Act. We do not exercise this replacement in the instant case; (2) "To affect is to produce a result on or to influence." Gallegos v. Duke City Lumber Co., Inc., 87 N.M. 404, 406, 534 P.2d 1116 (Ct.App. 1975). We can take nothing out of OSHA that will in any manner produce a result on or influence the Workmen's Compensation Act. What this means is so vague and uncertain as to bear upon speculation. Kentucky holds that OSHA does not prohibit the assessment of the safety device penalty under the Workmen's Compensation Act for violation of a regulation promulgated under the Kentucky KOSHA ACT. Barmet of Kentucky, Inc. v. Sallee, 605 S.W.2d 29, Ky.App. 29 (1980); Childers International Harvester Co., 569 S.W.2d 675 (Ky. 1977). See, American Smelting v. Workers' Compensation, Etc., 79 Cal.App.3d 615, 144 Cal.Rptr. 898 (1978). No other authority has been found on this subject matter. Plaintiff is entitled to a 10% penalty if evidence is produced which shows that the employer violated the safety device section of the Act.

No workman should suffer because of the inadvertence of a lawyer who failed to preserve an important issue in

an appeal. This case should be reversed and the plaintiff allowed to present evidence, if available, to show a violation of the safety device statute. The time has come in workmen's compensation cases to lay aside technical procedural rules in important cases of public interest. "Fairness" and "justice" should be the emblems of authority.

This case should be reversed. The trial court, in its discretion, should determine from evidence presented, the amount of compensation which would fairly and adequately compensate the plaintiff for total disability during his period of disability and shall allow plaintiff to present evidence, if available, of any violation of the safety device section of the Act.

/s/ Lewis J. Sutin
Judge

[Court of Appeals of New Mexico filed January 21, 1980, 5:03 PM, Nadine Speir, Bk. 25, pp. 441-443, Dep.]

IN THE DISTRICT COURT OF LUNA COUNTY, NEW MEXICO

No. CV 79-109

Judge Hughes

RAYMOND CASILLAS, Plaintiff,

-vs-

S.W.I.G. and ARGONAUT INSURANCE COMPANY, Defendants.

Order and Partial Summary Judgment

This matter came on for hearing on the Defendants' Motion for Partial Summary Judgment, pursuant to notice given, and the Court having reviewed the file and pleadings, including affidavits submitted in support of and in opposition to such motion, determines that such motion should be granted for the following reasons:

1. That the plaintiff concedes and there is no issue of fact that the defendants are paying and plaintiff is receiving the maximum compensation benefits, and also is being provided with medical benefits and rehabilitation services.

2. That the Defendants, although paying the maximum compensation benefits, have denied in their answer that plaintiff is totally or permanently disabled.

3. That the benefits payable under the Workmen's Compensation Act do not deprive plaintiff of or violate any of his constitutional rights.

4. That the plaintiff's Second Cause of Action in his First Amended Complaint should be dismissed and the plaintiff's First Cause of Action should be dismissed without prejudice as to all issues other than the claim of alleged failure to provide a safety device, as to which remaining issue the plaintiff may proceed. The Court expressly determines that there is no just reason for delay for the entry of this order and judgment.

5. That the Court is of the opinion that this Order or decision involves a controlling question of law, i.e. the constitutional issues raised, as to which there is substantial ground of difference of opinion and that an immediate appeal from this Order or decision may materially advance the ultimate termination of the litigation.

6. That the Order and Partial Summary Judgment entered December 26, 1979 did not include a finding by the Court that there was no just cause for delay under Rule 54 which would give the plaintiff an immediate right to appeal.

ORDERED that plaintiff's First Amended Complaint and all issues raised therein, with the exception of the issue as to the claimed failure to provide a safety device, be and the same hereby dismissed without prejudice, and plaintiff may proceed with the remaining issue as to the claimed failure to provide safety device; and it is further

ORDERED that plaintiff may proceed, without stay of these proceedings unless the appelate court so orders, with an interlocutory appeal pursuant to Section 39-3-4 N.M.S.A. 1978; and it is further

ORDERED that this Order and Partial Summary Judgment is entered nunc pro tunc as of December 26, 1979.

/s/ Ray Hughes
District Judge

APPROVED AS TO FORM:

/s/ Charles W. Cresswell
Attorneys for Plaintiff

_____

William W. Bivins
Attorneys for Defendants

[Supreme Court of New Mexico Filed June 18, 1981, Rose Marie Alderete]

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 13638

RAYMOND CASILLAS, Plaintiff-Appellant,

-vs-

S.W.I.G. and ARGONAUT INSURANCE COMPANY, Defendants-Appellees.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that Raymond Casillas, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Supreme Court of New Mexico denying the appellant's Writ of Certiorari entered herein on the 21st day of May, 1981.

This appeal is taken pursuant to 28 U.S.C., Section 1257(1).

MARTIN, MARTIN, LUTZ & CRESSWELL, P.A.

By /s/ Charles W. Cresswell
Attorneys for Plaintiff-Appellant
P.O. Drawer W—2100 N. Main
Las Cruces, NM 88004

We hereby certify that we mailed a copy of the foregoing pleading to opposing counsel of record, Luna County District Court Clerk and Court of Appeals Clerk on this 16th day of June, 1981.

By /s/ Charles W. Cresswell